IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-196

WESLEY BRABANT,
Petitioner,

v.

THE CITY OF SEATTLE, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

# BRIEF FOR THE RESPONDENTS ROBERT L. GREEN AND UNITED CONSTRUCTION WORKERS ASSOCIATION IN OPPOSITION

PETER GREENFIELD
LEGAL SERVICES CENTER
618 Second Avenue
Seattle, Washington 98104

Counsel for Respondents
Green and U.C.W.A.

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

## TABLE OF CONTENTS



## TABLES OF AUTHORITY

### Cases

## INTRODUCTION

The petition for writ of certiorari, to which this brief[1] is a response, was filed by an unsuccessful white applicant for promotion within the Engineering Department of the City of Seattle, Washington. Petitioner has challenged a part of the City's procedure for hiring and promotion which represents, as the trial court and a unanimous state supreme court recognized, a straight-forward application of the principles of Title VII of the Civil Rights Act of 1964.[2]

---

1. This brief is submitted by the United Construction Workers Association and Robert L. Green, intervenors in this case. The U.C.W.A. is a non-profit organization the objective of which is to promote equal employment opportunity. Mr. Green is a black member of the U.C.W.A. and a candidate for City employment who has passed one of the City's employment tests.

2. 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. Section 2000e et seq.

## STATEMENT OF THE CASE[3]

### 1. The City's Ordinary Hiring Procedure

The City of Seattle has, at all times relevant to this case, given unvalidated employment tests—tests that have not been demonstrated to be job related—to applicants for employment or promotion and, at the time of trial, it was expected that validation would take a number of years. The tests and the hiring procedures based on them have had a disproportionately adverse impact on applicants of minority races. For example, in the category of position relevant to petitioner's complaint—foremen in the Engineering Department—6% of the positions (3 out of 50) were held by minority employees at the time

3. The facts of this case are not in dispute and were summarized by the Washington Supreme Court beginning at Lindsay v. Seattle, 86 Wn.2d 698, 700, 548 P.2d 320, 323, A-1, A-5. "A" references are to the appendix to the petition for writ of certiorari.



of the promotion at issue here. People of minority races accounted for 14.7% of the Seattle population according to the last census, and 14.5% of the civilian labor force according to the latest estimate by the Seattle Chamber of Commerce.[4] This situation had resulted, by 1973, in a formal charge by the United States Equal Employment Opportunity Commission that the City had engaged in unlawful employment practices in violation of Title VII.

In the ordinary instance of City hiring or promotion, a department head requests the names of eligible applicants from the Civil Service Commission.

4. Puget Sound Prospectus-Affirmative Action, an analysis of the local population and labor force based on the United States Census, and reports of the Washington State Employment Security Department and the Office of Program Planning and Fiscal Management. The document also contains projections through the present which indicate a steady increase in minority percentage of the labor force. Record on Appeal in the Washington Supreme Court, pp. 114-115.

The Commission certifies to the department head the names of all applicants who passed the applicable (unvalidated) employment test and whose scores were within the top 25% or among the top 5. Because this procedure, in conjunction with its unvalidated tests, had a disproportionately adverse impact on minority applicants, the City established goals for the achievement of an integrated work force, and adopted a limited remedial procedure referred to as "selective certification."

2. The City's Affirmative Action Procedure

Under the selective certification procedure, a department head obtains, in place of the names of all other eligible applicants, the name of the highest-scoring minority applicant who has passed the applicable test but whose score is neither within the top 25% nor among the top 5. Selective certi-



fication may be used to fill one out of three vacancies when necessary to further a department's affirmative action goals. Hiring or promotion of a selectively certified applicant is not automatic; a department head must exercise discretion and may reject an unsuitable applicant.[5]

3. The Background of This Litigation

Petitioner is an unsuccessful white applicant for a position in the Engineering Department who would have been considered for the position under the City's ordinary procedure. He commenced this litigation after the position was filled under the selective certification procedure.

The minority applicant who got the job petitioner was seeking was promoted from within the Engineering Department. The record of his previous performance,

---

5. Equal Employment Opportunity Statement, Engineering Department, Record on Appeal in the Washington Supreme Court, pp. 131-132.

as well as his test score, was available to the department head. While his passing score on the test was slightly lower than that of petitioner, the test itself was unvalidated. Petitioner offered no evidence that the small difference in scores had any relevance to the applicants' respective abilities to do the job.

The trial court entered a summary judgment dismissing petitioner's complaint and that judgment was affirmed by a unanimous state supreme court. Petitioner's contention that the selective certification procedure violated Title VII was rejected by the trial court and on appeal. With respect to petitioner's contention that selective certification violated the Fourteenth Amendment, the trial court "did not consider" it, and the state supreme court ruled that it "need not be considered"



on review. 86 Wn.2d at 708, 548 P.2d at 327, A-14.

## ARGUMENT

### 1. The City's Ordinary Procedure Violates Title VII

Petitioner contends that "the City has not been proven to have discriminatory hiring patterns in practice." Petition, p. 15. However, he has stipulated that the City's test results "tend to cause the minority applicant to be placed at the lower end of the eligible registers and, therefore, have little or no chance of being employed." A-46. Furthermore, while he questions its implications, petitioner has not disputed the statistical evidence offered by the City, including the evidence that minority employees represented only 6% of the foremen in the Engineering Department in contrast to approximately 14.5% of the civilian labor force. Such

evidence of the disproportionate racial impact of employment tests, and hiring procedures based on them, makes a prima facie case of discrimination under Title VII. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). "[D]iscriminatory purpose need not be proved." Washington v. Davis, ___ U.S. ___, 48 L. Ed. 2d 597, 611, 96 S. Ct. 2040, 2051 (1976).

Petitioner has never contended that the City's employment tests could be shown to be job related. Not only have the tests themselves never been validated, but the requirement that an applicant score within the top 25% or among the top 5 scores—as distinguished from merely passing the test—has never been justified. The City's ordinary procedures create the kind of "'built-in headwinds' for minority groups" at which Title VII was directed. Griggs v. Duke Power Co., 401 U.S. at 432.



The City's ordinary employment procedures have been found, based on a rebuttable but unrebutted presumption, to result in invidious discrimination. Since the creation and validation of non-discriminatory, job-related procedures will require time, temporary remedial measures are called for. The continued use of the City's ordinary procedures, without remedial measures, would perpetuatue the discrimination that Title VII was enacted to end.

2. Selective Certification is an Appropriate Remedy

The measure under attack here affords a limited remedy only to those minority applicants who have taken and passed the City's current tests but who, like the minority applicant who got the job which petitioner sought, would have been precluded from consideration under the City's ordinary procedures. To compensate for the discriminatory effect

of those procedures, such minority applicants may be given a limited preference.

One consequence of such a limited preference is that applicants like petitioner lose the relative advantage that they had under the City's original, discriminatory procedures. But petitioner was not entitled to any such advantage.

Petitioner began with neither a right to, nor an expectation of, promotion. Had it not been for the selective certification procedure, petitioner would merely have been considered for the position at issue. His burden is less onerous than what this Court has sanctioned elsewhere. E.g., Franks v. Bowman Transportation Co., Inc., ___ U.S. ___, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976).

The Washington Supreme Court's application of Title VII in this case is consistent with prior decisions of this



court and does not warrant review. Review of petitioner's consitutional contention, not fully considered below, is not appropriate.

## CONCLUSION

The petition for writ of certiorari should be denied.

PETER GREENFIELD

Counsel for Respondents
Green and U.C.W.A.

August 31, 1976